

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(86) 193 final

Brussels, 11 April 1986

Proposal for a
COUNCIL DIRECTIVE
amending Directive 85/611/EEC as regards jurisdiction
in disputes arising from the marketing of units of
undertakings for collective investment in
transferable securities (UCITS)

(submitted to the Council by the Commission)

COM(86) 193 final

EXPLANATORY MEMORANDUM

1. During the discussion by the Council of the proposal for a Directive coordinating the rules relating to undertakings for collective investment in transferable securities (UCITS), a wish was expressed that an article be inserted in the Directive concerning jurisdiction in disputes arising from the marketing of UCITS units in a Member State other than that in which the UCITS is situated. Since it was not possible to agree in time on the wording of this article, the Council, wishing to enable the Directive to be adopted before the end of 1985, requested the Commission to submit a proposal to it at a later date.

2. The proposal was to cover the purchase of UCITS units by persons acting in a non-professional capacity and its purpose was to secure such purchasers the right in all cases to bring disputes relating to the marketing of units before the courts of the Member State in which the units were purchased.

It is a view to accomplishing that task that the Commission is submitting to the Council this proposal for a Directive, which should be regarded as a supplement to Council Directive 85/611/EEC of 20 December 1985¹ in so far as its sole purpose is to complement that Directive on one specific point. To that end the Commission proposes to insert an Article 48a in Section VIII.

3. As regards the legal basis of the proposal, the Commission considers that, in principle, a supplementary directive should not have a different legal basis from that of the directive in which it is inserted. It should be pointed out, however, that Article 48a introduces a rule of jurisdiction which partly derogates from the provisions of the Brussels Convention of 28 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. It is necessary, however, to justify this derogation from a legal point of view and, in this respect, it should be recalled that

¹ OJ No L 375, 31.12.1985

Article 57 (2) of the Brussels Convention ¹ (in the text amended by the Convention of Accession of 9 October 1978 of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the said Convention ²) specifically provides for the possibility of derogating on particular matters from the rules of jurisdiction laid down by the Convention through acts of the institutions of the European Communities.

It is not, however, necessary to add the above-mentioned provision of the Brussels Convention to the legal basis of the proposal for a supplementary Directive as it is not one which directly and specifically confers a power on the Council.

It is true that the said Article 57 (2) of the Brussels Convention has not yet entered into force as the 1978 Convention of Accession has not yet been ratified by a sufficient number of countries. However, according to information recently communicated to the Commission by the Member States concerned, the last instruments of ratification will be deposited in the first half of 1986. It may be anticipated, therefore, that the 1978 text will be in force when this proposal for a supplementary Directive is definitively adopted.

4. As regards the substance of the proposal, the Commission had to choose between exclusive jurisdiction for the courts of the Member State in which the units are marketed, and optional jurisdiction additional to that provided for in the Brussels Convention. It opted for the latter solution, firstly, in order to depart as little as possible from the Brussels Convention, which also provides for optional rules of jurisdiction for contracts concluded by consumers, and, secondly, in view of the objective of the new rule of jurisdiction. The latter is designed to protect the contracting party who is deemed to be economically weaker and on whom unfavourable contractual clauses may be imposed by the other, stronger, contracting party. Such protection, which is justified on the legal and moral level, cannot however subject him to a jurisdiction which is not necessarily in his interests, which might be the case if jurisdiction were exclusive (such would be the case, for example, if a person purchased UCITS units in a

¹ OJ No L 299, 31.12.1972

² OJ No L 304, 30.10.1978

Member State other than that in which he had his domicile and he were obliged, supposedly in order to protect him, to bring the matter before the courts of that Member State when he could have brought it before the courts of his domicile had such an obligation not existed.

5. The new rule of jurisdiction may be invoked by a person acquiring UCITS units if they were purchased direct from the undertaking itself or indirectly through a representative or agent of that undertaking. It may not be invoked, however, if the purchaser acquired those units in the territory of a Member State from a third party and not from the UCITS marketing its units in that Member State.

6. Since the jurisdiction provided for in the proposal for a supplementary Directive is optional and complements the normal rules of jurisdiction provided for in the 1968 Brussels Convention, it would be quite superfluous to specify in the text of the Directive that a purchaser of units in a UCITS may also sue that undertaking in the courts of the State where it has its head office. That already ensues from Article 2 of the Brussels Convention, which lays down a general rule that the court of the place where the defendant is domiciled has jurisdiction.

It should be noted here that, under Article 5 (1) of the same Convention, the applicant may, if he prefers, bring the matter before the courts of the place where the contractual obligation in dispute is to be performed. In short, according to the Commission proposal, a person acquiring units, i.e. the party one wished to protect, will have three choices as regards jurisdiction : he may bring the matter before the courts of the defendant's domicile, the courts of the place where the obligation alleged to have been breached was to be performed or the courts of the place where the UCITS were purchased.

7. The Commission would point out that it would not be enough, in order to settle the above-mentioned question, to refer in the supplementary Directive to Articles 13 et seq. of the Brussels Convention (1978 version) which, with a view to their protection, allow consumers to choose which courts should have jurisdiction when they bring proceedings against the other party to the contract. This is because it is doubtful whether a purchaser of UCITS units could be considered a "consumer" in the technical sense of the term.

It is of course possible that the Court of Justice might nevertheless recognize that a purchaser of UCITS units is to be considered a consumer for the purpose of applying Articles 13 et seq. In that event, those Articles could be applied in the case in question, with the result that the purchaser of units would, as far as the rules of jurisdiction were concerned, have dual safeguards which would duplicate one another to some extent. If, on the other hand, the Court considered - as seems more likely - that purchasers of units were not consumers, they would still be able to avail themselves of the protection afforded them by the rule of jurisdiction contained in this proposal for a Directive, particularly since such protection cannot be the subject of a prior waiver agreement (see point 8).

8. Article 1 (2) of the proposal is aimed at preventing the new rule of jurisdiction from being circumvented, particularly through the insertion, in application forms for the purchase of units, of a prorogation of jurisdiction clause conferring exclusive jurisdiction in any dispute on the courts of the place where the UCITS is situated, as is authorized by Article 17 of the Brussels Convention. To this effect the proposal provides that the purchaser's right to demand that this rule be applied cannot be the subject of a waiver agreement.

The Commission considers however that, in this respect also, safeguards for the weaker contracting party should not be taken too far. It doubtless appears necessary, for the reasons set out above, to prohibit prior agreements on prorogation of jurisdiction ; however, if the parties agree to confer jurisdiction on a given court after a dispute has begun, there seems to be no justification for preventing them from doing so on the pretext that that would involve an abuse of economic power on the part of the stronger party. Specific cases may exist in which it is in the interests of the purchaser of the UCITS units for the dispute to be settled by the courts of a place other than that in which the units were marketed, e.g. where the dispute concerns not only compliance with the marketing rules but also other problems.

9. Lastly, the rule contained in Article 1 (3) of the proposal for a Directive is aimed at confining the rule of jurisdiction to cases where protection of a weaker contracting party may be envisaged. This is not a priori so in the case of professional purchasers of units.

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THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 57 (2) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the Economic and Social Committee,

Whereas Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)¹ contains no provisions on jurisdiction in disputes arising from the marketing of UCITS units, so that the rules of the Brussels Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters² are at present applicable in this area ;

¹ OJ No L 375, 31.12.1985, p. 3.

² OJ No L 299, 31.12.1972, p. 32.

Whereas, however, in accordance with the wish expressed by the Council in adopting the above-mentioned Directive, that Directive should be amended by a Directive having the same legal basis and containing specific provisions on jurisdiction ;

Whereas it appears necessary to provide for persons acting in a non-professional capacity the possibility of bringing before the courts of the Member State in whose territory they acquired UCITS units any dispute concerning the infringement by a UCITS of the rules applicable in the event of its marketing its units in a Member State other than that in which it is situated, as laid down in Section VIII of Directive 85/611/EEC ; whereas protection is thus afforded to the economically-weaker contracting party, as provided for in Title II, Section 4 of the Brussels Convention, as amended by the Convention of Accession of 9 October 1978¹ of Denmark, Ireland and the United Kingdom to the said Convention, with respect to contracts concluded by consumers ;

Whereas, however, such protection need be provided only in so far as it is really useful and necessary and, to that end, it seems advisable merely to lay down a rule of optional jurisdiction relating to disputes concerning contractual obligations, additional to the normal rules provided for by the Brussels Convention and in particular Articles 2 and 5 (1) thereof ;

Whereas it is further necessary to prevent the rule of jurisdiction thus laid down being circumvented by imposing on purchasers of UCITS units, in disputes arising from the purchase of units, a contractual clause conferring different jurisdiction within the meaning of Article 17 of the Brussels Convention ; whereas, to that end, it should be prescribed that the optional jurisdiction introduced by this Directive cannot be the subject of a waiver on the part of a person purchasing units, unless such a waiver occurs after the dispute has arisen ;

Whereas Section VIII of Directive 85/611/EEC covers cases in which a UCITS markets its units in a Member State other than that in which it is situated and the rule of jurisdiction provided for by this Directive must be applied only when the units are marketed by the UCITS, whether this is done directly by the UCITS or indirectly through a representative or agent ; whereas

¹ OJ No L 304, 30.10.1978, p. 1.

this rule must not apply if there is no economically-weak party to be protected, as is the case when a purchaser of units acts in a professional capacity ;

Whereas the measures provided for in this Directive should be brought into effect at the same time as those provided for by Directive 85/611/EEC,

HAS ADOPTED THIS DIRECTIVE :

Article 1

The following Article is hereby inserted in Directive 85/611/EEC :

"Article 48a

1. A person who has acquired UCITS units in a Member State other than that in which the UCITS is situated may bring disputes relating to compliance with the provisions contained in this Section before the courts of the Member State in whose territory he acquired those units, whether he acquired them direct from the UCITS or through a representative or agent of that UCITS.

2. The right of a person acquiring units referred to in paragraph 1 may not be the subject of a waiver agreement, even if provided for by a clause inserted in the contract relating to the acquisition of the units, unless such a waiver occurs after the dispute has arisen.

3. The provisions of paragraphs 1 and 2 shall not apply if the acquisition of the units falls within the scope of the professional activities of the person acquiring them."

Article 2

Member States shall bring into force the measures necessary to comply with this Directive within the same period as that provided for in Directive 85/611/EEC. They shall forthwith inform the Commission thereof.

Article 3

This Directive is addressed to the Member States.

Done at

For the Council